Supreme Court, U.S.
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No. 03-1388

In The Supreme Court of the United States

DOUGLAS SPECTOR, *ET AL.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, apply to foreign cruise ships?

CORPORATE DISCLOSURE STATEMENT

The corporate parent of Norwegian Cruise Line Ltd. is Arrasas, Ltd., which in turn is wholly owned by Star Cruises PLC, a Malaysian company. Star Cruises PLC is a public company and its shares are traded on several foreign stock exchanges.

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RESPONSE TO PETITION FOR CERTIORARI

Certiorari is warranted to enable this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit and overrule the erroneous decision of the United States Court of Appeals for the Eleventh Circuit in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002).

STATEMENT

1. Respondent Norwegian Cruise Line Ltd. (NCL) operates a fleet of oceangoing cruise ships that depart on pleasure cruises from ports in the United States and, at present, two other continents.[1]

NCL welcomes disabled passengers on its ships. It has been NCL's experience that disabled persons often view cruises as ideal vacations because cruise ships offer numerous activities and services in a self-contained, accessible space. NCL is fully committed to making its many disabled passengers' cruise experiences as accessible, integrated, and enjoyable as possible. NCL rejects discrimination against its disabled passengers in any form.

2. Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, contains a lengthy and

[1] The implication that all NCL ships depart from U.S. ports (Pet. 3), is incorrect. Like most major cruise lines, NCL operates cruise ships that depart from ports in other countries and do not enter U.S. waters for the duration of the cruises. See, e.g., NCL's "Scandinavian Capitals" Itinerary, *available at* http://www.ncl.com/itinerary/it_euro.htm (last visited July 2, 2004).

exhaustive list of "public accommodations" and "specified public transportation" services subject to the statute. 42 U.S.C. §§ 12181(7), 12181(10). Foreign ships are not mentioned anywhere in this text, nor are they identified anywhere in the extensive legislative history of the statute. Moreover, there are no accessibility standards specific to ships, even though the Department of Justice – which has asserted that the statute should apply to foreign ships – recognized in 1991 that cruise ships are sufficiently different from land-based structures to require their own set of accessibility guidelines. See 56 Fed. Reg. 35544, 35550 (July 26, 1991).

3. Three of the petitioners are mobility impaired. (Amended Compl. ¶¶ 7-8.) Two of the petitioners are not mobility impaired but traveled with two mobility impaired petitioners during NCL cruises. (*Id.* ¶ 18.) Petitioners allege that they took cruises aboard the *Norwegian Star* and the *Norwegian Sea*. (*Id.* ¶¶ 11, 17.) The ships departed from the Port of Houston, Texas, traveled to foreign ports of call, and returned to Houston. (Pet. App. 2a.) Both ships sailed under the Bahamian flag. (*Id.*)

On August 1, 2000, petitioners filed this putative class action lawsuit in the district court on behalf of all "current and former" passengers of all NCL cruises who are mobility impaired or who had a "known association" with mobility-impaired passengers during the cruise. (Amended Compl. ¶ 23.) Petitioners assert that NCL's foreign cruise ships are governed by Title III of the ADA. (Pet. App. 2a.) Primarily, they allege that Title III requires NCL to make modifications to the physical structure of each of its ships. Petitioners seek modifications to the ships' cabins, restaurants, swimming pools, restrooms, elevators, and other unspecified structures. (Pet. 4; Amended Compl. ¶¶ 17, 31, 38.)

Petitioners also allege that they were subjected to alleged discriminatory onboard policies and procedures, for which they seek injunctive relief. (Pet. 4-5.)

Petitioners' allegations of discrimination are meritless. NCL does not discriminate against its many disabled passengers, and petitioners are no exception. NCL nevertheless recognizes that in the procedural context of the case, this Court must assume that petitioners' allegations are true. Thus, NCL proceeds by assuming, as it must (for the limited purpose of resolving the question presented here), the truth of petitioners' allegations regarding inaccessibility of certain areas of NCL ships and the content of certain NCL policies and procedures.[2]

4. In the district court, NCL moved to dismiss petitioners' complaint for failure to state a claim. NCL argued that Title III does not govern foreign ships because there is no evidence that Congress intended the statute to be applied to such ships. NCL argued that the application of Title III to foreign ships conflicts with comity principles and creates potential substantive conflicts with international conventions and foreign law. Also, a lack of guidance from Congress as to how the statute should be applied to foreign ships leaves cruise lines like NCL unable to determine in advance how to comply with the law.

In the alternative, NCL argued that petitioners' claims seeking the removal of structural barriers on NCL's ships must be dismissed because the federal agencies charged with promulgating architectural and design standards under Title III have never done so with respect

[2] In any event, these factual allegations are irrelevant for present purposes. The issue before this Court is a pure question of law.

ve ships – despite having had over a dozen years. NCL also argued that the non-mobility impaired petitioners' claims for "associational discrimination" fail because the non-mobility impaired petitioners do not allege that they were singled out for discrimination.

The district court, relying on the Eleventh Circuit's opinion in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002), held that Title III applies to foreign ships within the territorial waters of the United States. (Pet. App. 35a.) The district court nevertheless dismissed petitioners' barrier removal claims, recognizing that the lack of architectural standards specific to ships destroys Congress's goal in Title III of establishing uniformity in aspects of the design and structure of public accommodations. (*Id.* 42a.) The lack of standards also leaves cruise ships unable to determine what is required by the statute. (*Id.*) Finally, the court permitted the non-mobility impaired petitioners to proceed on their claims for "associational discrimination." (*Id.* 46a-47a.)

5. Citing 28 U.S.C. § 1291(a), petitioners filed a notice of appeal challenging the district court's dismissal of their barrier removal claims. Separately, NCL sought certification of the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b) so that it could seek review of the court's ruling that Title III applies to foreign ships. The district court certified its order for interlocutory appeal under section 1292(b), finding two questions of law to be controlling: "(1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's

existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships."[3] (Resp. App. 4.) NCL received the court of appeals' permission to pursue its separate appeal on these issues. The Fifth Circuit ultimately consolidated the two appeals.

The Fifth Circuit held that "[f]oreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so." (Pet. App. 15a.) The court observed that although the United States has the raw power to subject foreign ships to its laws, whether it exercises that power is within Congress's discretion. (*Id.* 4a-5a.) For a court to apply a statute to a foreign ship, there must be specific and clear evidence in the statute or its legislative history indicating Congress's intent to do so. (*Id.* 7a-8a, citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).) As the court of appeals stated, "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." (Pet. App. 8a.)

The Fifth Circuit found no evidence that Congress had intended that Title III apply to foreign ships. (*Id.* 8a.) The court also noted the potential conflict between the requirements of Title III and the international convention governing maritime architecture, the International Convention for the Safety of Life at Sea (SOLAS), 32 U.S.T. 47, T.I.A.S. No. 9700 (1974). (Pet. App. 8a-9a.)

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[3] The courts below referred to the ships at issue as "foreign-flagged ships" or "foreign-flagged cruise ships." In this Response, NCL uses the more concise term "foreign ships," which has the same meaning, *i.e.*, ships registered in a foreign country.

The Fifth Circuit rejected the Eleventh Circuit's contrary ruling in *Stevens*. The court first disagreed with the Eleventh Circuit's refusal to apply the presumption against the application of U.S. statutes to foreign ships. (*Id.* 12a-13a.) Although the Eleventh Circuit had held this presumption to be applicable only to labor relations laws (*id.*), the Fifth Circuit observed that petitioners' requested relief – which encompasses structural modifications, policy changes, and changes in crewmember duties – would affect the "internal management and affairs" of the ships no less than would labor relations laws. (*Id.* 13a.) Thus, in contrast to *Stevens*, the Fifth Circuit found the presumption in *Benz* and *McCulloch* to be applicable to the instant question. (*Id.* 12a-13a.)

The circuits also differed over the question whether application of Title III would require an impermissible extraterritorial application of the statute. (*Id.* 10a-11a, 13a.) Whereas the *Stevens* court found no requested extraterritorial application (215 F.3d at 1242), the Fifth Circuit believed it to be obvious that the permanent modifications to ship structure and policies sought under Title III would necessitate an extraterritorial application once the ships left U.S. waters. (Pet. App. 11a-13a.) This would be impermissible because there is no evidence that Congress intended the statute to apply extraterritorially. (*Id.*)

The two circuits also disagreed whether Title III should be narrowly construed to avoid potential conflicts with international law. The Eleventh Circuit declined to consider the effect of potential conflicts of law, ruling that conflicts were appropriately considered only when specific conflicts between the plaintiffs' requested relief and international law had been proven. *Stevens*, 284 F.3d at

1187. In contrast, the Fifth Circuit, explicitly rejecting the Eleventh Circuit's approach (Pet. App. 12a n.9), held that potential conflicts affect the manner in which the statute should be interpreted. (*Id.* 8a.) Because of the possibility of conflict between Title III and SOLAS, the court ruled that Title III should not be interpreted to include foreign ships. (*Id.* 9a.)

Neither the Fifth Circuit nor the Eleventh Circuit held, as petitioners claim (Pet. 1, 9, 11, 12 & n.2, 21, 22), that Title III could never be applied to the conduct of the operators of foreign cruise ships that do business in the United States. Neither court had occasion to consider the circumstances under which Title III applies to services provided by land-based accommodations operated by foreign companies, as the claims in both cases related only to the services offered by foreign cruise ships. (Pet. App. 2a; *Stevens*, 215 F.3d at 1240, 1243.)

In an unpublished order, the Fifth Circuit denied petitioners' petition for rehearing en banc. (Pet. App. 48a-49a.)

6. On April 1, 2004, petitioners sought a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

Although petitioners and NCL disagree about many aspects of the case, including both the question presented and the proper answer to that question, NCL agrees that this is an important case raising a significant issue of federal law that this Court should decide.

I. This Case Presents the Question Whether Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, Applies to Foreign Cruise Ships.

NCL agrees that the Court should decide this case, but it is important to recognize the correct issue raised by petitioners' allegations and addressed by the courts below. The proper question before this Court is not, as petitioners claim, whether Title III applies to "companies" that operate foreign cruise ships. (Pet. i.) Nor is the question "whether Title III applies to the on-land conduct of companies that operate foreign-flag ships." (*Id.* 11.) Nor is the question generally "whether U.S. citizens enjoy the protection of U.S. law when they contract to take a cruise that originates in a U.S. port and is operated by a company whose principal place of business is the United States." (*Id.* 15.) All of these questions are overbroad and misstate the relevant issue.

Title III governs "place[s] of public accommodation," 42 U.S.C. § 12182(a), and "specified public transportation services," 42 U.S.C. § 12184(a), as those terms are defined by the statute. Because statutory coverage is determined on a place-by-place or transportation service-by-service basis, it is incorrect to ask whether the statute applies to particular operators such as NCL.[4] In view of the statutory

[4] The threshold issue under Title III is whether a place of public accommodation is involved. The role assigned to an "operator" under the statute is to ensure that a place of "public accommodation," as defined by the statute, complies with the statutory non-discrimination requirements. See 42 U.S.C. § 12182(a). An operator of one place of public accommodation does not become subject to Title III with respect to *all* structures that it operates. Even the Department of Justice and the *Stevens* court – each of which has otherwise taken an overly

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language, the precise issue in this case is whether Title III applies to "place[s] of public accommodation" on foreign cruise ships or to "specified public transportation services" offered by foreign cruise ships.[5] Asking whether Title III applies to foreign cruise ships is a convenient and accepted shorthand for this more precise formulation of the question.

The courts below consistently recognized that the issue before them was whether Title III applies to foreign cruise ships – not whether Title III applies to the operators of foreign cruise ships. The opening sentence of the Fifth Circuit's opinion declares that the case "presents the question whether Title III [of the ADA] applies to foreign-flagged cruise ships." (Pet. App. 2a.) The issue is described in virtually the same terms throughout the opinion.[6] And

expansive view of Title III's scope – recognize this fundamental proposition. See United States Department of Justice, ADA Title III Technical Assistance Manual III-1.2000 (1993), *available at* http://www.usdoj.gov/crt/ada/taman3.html (last visited July 2, 2004); *Stevens*, 215 F.3d at 1241 & n.5. Conversely, an operator does not become wholly exempt from Title III merely because some of its structures are not public accommodations as defined by the statute.

[5] Petitioners do not bring any claims relating to land-based accommodations that NCL may own or operate, or to land-based transportation services that NCL might have provided. All of the claims relate to the accommodations and services on the *Norwegian Star* and the *Norwegian Sea*. See also *infra* note 8 (discussing petitioners' argument regarding NCL's "on-land pricing policies").

[6] See, e.g., Pet. App. 3a n.2 ("we conclude that Title III of the ADA does not apply to foreign-flagged cruise ships"); *id.* 4a ("NCL challenges the district court's conclusion that Title III of the ADA applies to foreign-flagged cruise ships."); *id.* 4a ("no evidence that Congress intended Title III to apply to foreign-flagged vessels"); *id.* 4a n.3 ("we . . . limit this decision to foreign-flagged cruise ships"); *id.* 5a (describing the issue as whether "to apply domestic law to foreign vessels"); *id.* 8a ("Congress may enact legislation that governs foreign-flagged cruise

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in its Conclusion, the court of appeals summarizes its holding with the statement that "[f]oreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so." (*Id.* 15a.)

There is no basis for petitioners' contrary characterization of the Fifth Circuit's decision. In the opening paragraph of their argument, for example, petitioners assert that the decision below applies "to foreign-flagged cruise ships *and their operating companies*." Pet. 9 (citing Pet. App. 14a-15a) (emphasis added). The cited portion of the opinion, however, mentions only "foreign-flagged cruise ships"[7] (three times); it says nothing about the companies that operate these vessels. Petitioners then assert without citation that this case involves not only foreign cruise ships but also "their parent companies" (Pet. 11), "their operating companies" (*id.*), the "companies that operate" them (*id.*), "a company that operates" them (*id.* at 12 n.2), and "foreign-flag cruise *lines*" (*id.* at 21) (emphasis in original). But in fact the Fifth Circuit never mentions "parent companies" or the companies that operate foreign cruise ships, and it mentions a cruise line only when it names NCL as a party to the action. (Pet. App. 2a.)[8]

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ships"); *id.* 14a-15a ("application of Title III to foreign-flagged cruise ships is impermissible").

[7] The cited portion of the opinion includes six additional references to "cruise ships" without specifying their nationality (or mentioning their operators). (Pet. App. 14a n.10.)

[8] Petitioners criticize the Fifth Circuit for having "dismissed [their] claims that [NCL's] on-land pricing policies violate Title III." (Pet. 21.) This criticism appears to be an indirect argument that the court of appeals implicitly held that Title III does not apply to the operators of foreign cruise ships. But petitioners misunderstand the scope of Title

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Even petitioners recognized the proper issue in the court below. Petitioners' argument on this issue appears under the heading "THE ADA APPLIES TO NCL'S FOREIGN-FLAGGED SHIPS" (Pet. CA5 Reply Br. 5), and they consistently phrased their argument in these terms (see *id.* at 5-25).

The district court was equally clear that the relevant issue was whether Title III applied to foreign cruise ships. Not only did its opinion characterize the issue as "whether the ADA applies to foreign-flagged cruise ships" (Pet. App. 19a), but in its order permitting NCL to seek an interlocutory appeal, it framed the relevant controlling question of law as "whether Title III of the ADA applies to foreign-flagged cruise ships." (Resp. App. 4.)

It is also noteworthy that in *Stevens v. Premier Cruises, Inc.* – the case whose clear conflict with the decision below justifies this Court's grant of certiorari – the Eleventh Circuit addressed only whether Title III applies to foreign cruise ships.[9] As with the decision below,

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III. NCL's so-called "on-land pricing policies" could not violate Title III unless they relate to "place[s] of public accommodation," 42 U.S.C. § 12182(a), or "specified public transportation services," 42 U.S.C. § 12184(a), as those terms are defined by the statute. The only "on-land pricing policies" that petitioners challenge in this case relate to NCL's foreign cruise ships. As the statutory language reveals, the correct question is whether Title III applies to these foreign vessels.

In any event, petitioners did not argue below that NCL's pricing policies were unrelated to NCL's foreign cruise ships because they were "on-land." As the courts below never had the opportunity to address this argument, it has been waived.

[9] Indeed, the Eleventh Circuit was very clear that the question before it was whether the "public accommodations" on a foreign cruise ship are subject to Title III. The court carefully explained why parts of a

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there was no consideration of whether Title III applies to the companies that operate foreign cruise ships.

Petitioners' complaint demands an answer to the question whether Title III applies to foreign cruise ships; the case does not raise any issue about the applicability of Title III to the companies that operate them. Throughout the proceedings in the district court and the court of appeals, everyone involved clearly understood the scope of the fundamental question regarding the applicability of the statute. This Court should now answer that question. Petitioners should not be permitted to raise new issues that were not mentioned or decided below, and that the case does not present. NCL therefore respectfully requests that certiorari be granted solely with respect to the question that the case does present – whether Title III applies to foreign cruise ships.[10]

II. The Acknowledged Conflict Between the Fifth and Eleventh Circuits Unacceptably Subjects Foreign Cruise Ships to Inconsistent Legal Standards.

As petitioners observe, the majority of United States cruises depart from ports in the Fifth and Eleventh

cruise ship that did not qualify as "public accommodations" were not subject to Title III. See 215 F.3d at 1241 & n.5.

[10] This Court has not hesitated, in an appropriate case, to rephrase the question presented by a petitioner. See, e.g., *Clay v. United States*, 536 U.S. 981 (2002); *Miller-El v. Cockrell*, 535 U.S. 903 (2002); *Hope v. Pelzer*, 534 U.S. 1120 (2002); *Becker v. Montgomery*, 531 U.S. 1110 (2001). In order to focus the parties' attention during briefing on the actual question that this Court would be called upon to decide, the Court should rephrase petitioners' question here.

Circuits. (Pet. 12.) The circuit split between the Fifth and Eleventh Circuits[11] means that most foreign cruise ships, including NCL's ships, are subject to two different legal regimes affecting their structure and onboard policies. When sailing to or from ports in the Fifth Circuit, foreign cruise ships must comply with the law of the flag state. At a bare minimum, this law includes the existing set of design, operations, and equipment standards contained in SOLAS, which has been ratified by nearly every seafaring nation, including the Bahamas. See United States Department of State, Treaties in Force 423-24 (2003); see also, e.g., *United States v. Locke*, 529 U.S. 89, 102-03 (2000); *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1079 (CA2 1993).

In the Eleventh Circuit, by contrast, foreign cruise ships must comply with flag-state obligations and with Title III. Of course, the lack of any accessibility standards under Title III for cruise ships makes it impossible to know what may be required. Yet even playing the guessing game necessitated by this vagueness, certain courts could interpret the statute to require some form of accessibility-related structural modifications to the ships. (Pet. App. 13a.) Title III may also be read to require cruise ships to change crewmember duties and to implement, rescind, or

[11] The United States District Court for the Northern District of California recently considered the question presented in this case and, like the Fifth Circuit below, held that Title III does not apply to foreign ships. See *Giacopini v. Crystal Cruises, Inc.*, Case No. C-04-1089MMC (N. D. Cal. June 25, 2004). After reviewing the analysis in both *Stevens* and *Spector*, the *Giacopini* court found "the detailed analysis set forth in *Spector* to be persuasive and, for the reasons set forth in *Spector*," found "that Title III of the ADA has no applicability to foreign-flag cruise ships." (Slip Op. at 10.)

modify onboard policies and procedures. (*Id.*) If the current circuit split is unresolved, whether a cruise ship must account for these unknown potential requirements depends solely upon the court that decides the case.

A circuit split is particularly intolerable in this case because cruise ships move from jurisdiction to jurisdiction as cruise lines change their itineraries. For example, the ship primarily at issue in this case – the *Norwegian Sea* – left the Houston market in December 2000, sailed other itineraries in other jurisdictions, and then returned to Houston in November 2003. See Harry Shattuck, *NCL's Texarribean Cruises Will Resume in November*, Houston Chronicle, October 26, 2003, Travel section, at 6. As a practical matter, most, if not all, of the modifications that could be sought by plaintiffs under Title III are likely to remain in place even when the ship sails to another jurisdiction. To the extent that Title III requires structural modifications, ships would have little choice but to comply with this aspect of Title III at all times, whether in domestic or foreign jurisdictions, if there is any chance that they might sail to the Eleventh Circuit.

III. This Court Should Overrule the Eleventh Circuit's Erroneous Decision in *Stevens* in Favor of the Fifth Circuit's Ruling Below.

This case provides the Court with the ideal opportunity to overrule the erroneous *Stevens* decision. Until *Stevens* is overruled, it will continue to create intolerable problems for the cruise line industry.

As the Fifth Circuit correctly recognized, the flag state presumptively determines the law onboard a ship, even when the ship calls in the ports of other nations. See, e.g.,

Restatement (Third) of the Foreign Relations Law of the United States §§ 501, 502 cmt. a. This well-established principle of maritime and international law prevents unintended clashes between port states and flag states over the governance of oceangoing ships. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578-82 (1953). It also furthers maritime commerce by protecting ships from becoming subject to multiple, and perhaps conflicting, sets of laws. See, e.g., *id.* at 585.

The legislature, not the courts, decides whether and under what circumstances the United States will disregard this principle when foreign ships enter U.S. waters. In deference to Congress, courts do not apply U.S. law to foreign ships unless Congress has specifically expressed its intent that the statute apply to such ships. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The Fifth Circuit correctly found no evidence that Congress intended Title III to apply to foreign ships. (Pet. App. 8a.) It also found a potential for conflict between the requirements of Title III and SOLAS, the international convention governing ship structure and design. (*Id.* 8a-9a.) Further, the court correctly observed that the application of Title III to foreign ships would necessitate an impermissible extraterritorial application of the statute when those ships left U.S. waters. (*Id.* 10a-11a, 13a, citing *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244 (1991).) For these reasons, the court properly declined to adopt petitioners' expansive reading of Title III to regulate foreign ships.

The contrary *Stevens* decision reached the wrong result and should be overruled. The Eleventh Circuit first erred by finding the canon of construction in *Benz* and *McCulloch* – requiring "specific language" and a "clear express[ion]" of congressional intent to apply a statute to foreign ships – to be inapplicable in the context of Title III. According to the Eleventh Circuit, *Benz* and *McCulloch* apply only to statutes that affect the "internal management and affairs" of the ship. *Stevens*, 215 F.3d at 1242. A ship's "internal affairs," according to the *Stevens* court, include labor relations between the crew and the shipowner, but remarkably not the ship's structure, policies, and crewmember duties. *Id.*

The *Stevens* court misunderstood and misread *Benz* and *McCulloch*. The purpose of the presumption that this Court announced in those cases is to reserve to Congress the exclusive authority to determine whether and when the United States will interfere with another nation's exercise of its sovereign power over its ships. *Benz*, 353 U.S. at 144; *McCulloch*, 372 U.S. at 20. The *Stevens* court erred by failing to recognize that the potential to interfere with matters governed by the flag state exists not only with respect to labor relations, but also to modifications of a foreign ship's structure, policies, and crewmember duties. (Pet. App. 13a.)

The Eleventh Circuit also erred by dismissing *EEOC v. ARAMCO* as inapplicable. See *Stevens*, 215 F.3d at 1242. It overlooked the obvious fact that the plaintiff's requested relief – which included permanent structural modifications and policy changes – would require enforcement of Title III outside United States waters, including in foreign ports of call. This relief plainly would require an extraterritorial application of the statute. *ARAMCO*

controls and, like *Benz* and *McCulloch*, holds the statute inapplicable. (Cf. Pet. App. 10a-11a.)

Further, the Eleventh Circuit misunderstood the effect of the potential conflicts between application of Title III and other law. As a matter of statutory construction, statutes should be interpreted to minimize potential conflicts with international and foreign laws. Thus, consistent with the presumptions articulated in *Benz*, *McCulloch*, and *ARAMCO*, Title III should be narrowly construed to exclude foreign ships.

In sum, the *Stevens* decision is poor law for many reasons. It requires courts to ignore congressional silence and thus disregard comity principles that might otherwise call for restraint; it risks a conflict of laws between Title III and international and foreign laws; and it subjects cruise lines to significant potential liability without the guidance from Congress that would have, and should have, been provided had the statute been intended to regulate foreign ships.

CONCLUSION

The petition for a writ of certiorari should be granted solely with respect to the question whether Title III applies to foreign cruise ships.

Respectfully submitted,

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July 6, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS SPECTOR, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION**
NORWEGIAN CRUISE LINE LIMITED d/b/a NORWEGIAN CRUISE LINE,	§	**NO. H-00-2649**
	§	
Defendant.	§	

ORDER

Pending before the Court are Plaintiffs' motion for entry of final judgment (Dkt. #35), Defendant's motion to certify order for appeal and stay the remaining litigation (Dkt. #37), and Defendant's motion to stay the remaining litigation pending resolution of Plaintiffs' appeal (Dkt. #39). After careful consideration of the parties' arguments and the applicable law, the Court hereby DENIES Plaintiffs' motion and GRANTS Defendant's motions, for the reasons explained below.

Discussion

On September 10, 2002, this Court entered a Memorandum & Order (Dkt. #32) granting in part and denying in part Defendant's motion to dismiss Plaintiffs' claims. Specifically, the Court dismissed Plaintiffs' claim for injunctive relief against Defendant seeking removal of physical barriers to existing facilities on Defendant's ships. The Court denied Defendant's motion to dismiss

Plaintiffs' remaining claims. On September 24, 2002, Plaintiffs asked the Court to enter final judgment as to the dismissed claim pursuant to Federal Rule of Civil Procedure 54(b). Defendant timely filed its response asking the Court to deny the motion, or, in the alternative, certify the Court's September 10th order for appeal under 28 U.S.C. § 1292(b) and stay the litigation pending appeal. On October 8, 2002, Plaintiffs notified the Court that they were pursuing an appeal under 28 U.S.C. § 1292(a)(1) of the Court's dismissal of the claim for injunctive relief. As a result, Defendant has asked the Court to stay the pending litigation until resolution of the 28 U.S.C. § 1292(a)(1) appeal.

Defendant maintains that it would be improper for the Court to enter final judgment as to Plaintiffs' dismissed claim for injunctive relief. Federal Rule of Civil Procedure 54(b) provides in relevant part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Under this Rule, a district court may enter final judgment if it determines both that there is no just reason for delay and that it is "dealing with a 'final judgment.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980). In making this determination, the district court must consider "whether the claims under review [are] separable from the others remaining to be adjudicated." *Id.* at 8. It should be the goal of the district court to prevent an

appeals court from having "to decide the same issues more than once even if there were subsequent appeals." *Id.*

The Court is of the opinion that entry of final judgment would be improper in this case. In dismissing Plaintiffs' claim for injunctive relief, the Court determined that federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's[1] existing barrier removal guidelines. The Court's determination with respect to barrier removal was predicated on a finding that Title III of the ADA applies to foreign-flagged cruise ships, such as those owned and operated by Defendant. Accordingly, the Court finds that Plaintiffs' claim seeking barrier removal of Defendant's ships is not entirely separable from the remaining claims in this case. Rather, all of Plaintiffs' claims are connected by the underlying assertion that Title III of the ADA applies to foreign-flagged cruise ships. Accordingly, the Court denies Plaintiffs' motion for entry of final judgment.

The Court, however, does believe that an immediate appeal is appropriate in this case. The Court is of the opinion that 28 U.S.C. § 1292(b) provides the proper mechanism for such an appeal. That statute states:

> When a district judge, in making in a civil action an order not otherwise appealable in this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and

[1] Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*

> that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall state so in writing in such order.

In its September 10th Order, the Court admitted that Defendant's motion to dismiss presented difficult issues, which various district courts have resolved in different ways. In particular, the Court believes that there is substantial ground for difference of opinion on two of the Court's findings in this case: (1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships.

The Court is of the opinion that an appeal of the unsettled questions of law described above "may materially advance the ultimate termination of the litigation" in this case. *See* 28 U.S.C. § 1292(b). Therefore, the Court finds that an immediate appeal under Section 1292(b) would be appropriate. The Court believes that such an appeal is the most efficient way to achieve the correct legal result in this case. Accordingly, the Court grants Defendant's motion to certify the Court's September 10, 2002 Order for immediate appeal under 28 U.S.C. § 1292(b).

Conclusion

For the foregoing reasons, Plaintiffs' motion for entry of final judgment is DENIED. Defendant's motion to certify the Court's September 10, 2002 order for appeal and to stay the litigation is GRANTED. Defendant's

motion to stay the litigation pending resolution of Plaintiffs' Section 1292(a)(1) appeal is GRANTED. It is therefore ORDERED that all litigation in this cause of action shall be STAYED pending resolution of Plaintiffs' Section 1292(a)(1) appeal and any Section 1292(b) appeals of the Court's September 10, 2002 Order.

It is so ORDERED.

Signed this 26th day of November, 2002.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE